

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
AMARILLO DIVISION

UNITED STATES OF AMERICA

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§  
§  
§  
§

CRIMINAL ACTION

VS.

NO. 2:21-CR-025-Z (01)

BART WADE REAGOR

TRANSCRIPT OF CRIMINAL TRIAL BY JURY  
CHARGE CONFERENCE  
BEFORE THE HONORABLE MATTHEW J. KACSMARYK  
UNITED STATES DISTRICT JUDGE

OCTOBER 13, 2021

VOLUME III OF IV

AMARILLO, TEXAS

A-P-P-E-A-R-A-N-C-E-S

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**CHARGE CONFERENCE**

**OCTOBER 13, 2021**

**(The following took place in open court with all parties present.)**

**THE COURT:** Please be seated. Okay. We are back on the record in Case No. 2:21-CR-025-Z, United States of America versus Bart Wade Reagor.

Have both Government and Defendant received the promised consolidated version of the proposed jury charge with the disputed language in bold?

**MS. BURCH:** Yes, Your Honor.

**THE COURT:** Okay. And from the Defense?

**MR. NORRIS:** Yes, Your Honor.

**THE COURT:** Okay. So when we read this to the jury when it's in final form, I will instruct the parties to approach to make their necessary record objections as to the Court's reading.

I'm inclined not to read this line by line where there really isn't a dispute, but, if you want to do it word by word, line by line, we can.

So Ms. Burch?

**MS. BURCH:** Your Honor, we would like to just go to the parts that are disputed, if that's --

**THE COURT:** Okay. So let's do it page by page. Where there's no dispute, I'll get that on the record, and

1 then we can do it page by page instead of line by line.

2 So Page 1, 1.03 Introduction to Final Instructions.  
3 Does the Government have any objections to the proposed jury  
4 charge language appearing on Page 1?

5 MS. BURCH: No, Your Honor.

6 THE COURT: Does the Defendant have any objections  
7 to the proposed jury charge language appearing on Page 1?

8 MR. NORRIS: No, Your Honor.

9 THE COURT: And I know these pages aren't numbered.  
10 Actually, I think your clean version may be. Okay.

11 MS. BURCH: Mine are numbered, Your Honor.

12 THE COURT: Okay. Page 2, 1.04 Duty to Follow  
13 Instructions. Does the Government have any objections to the  
14 proposed jury charge as it appears on Page 2?

15 MS. BURCH: No, Your Honor.

16 THE COURT: Does the Defendant have any objections  
17 to the proposed jury charge as it appears on Page 2?

18 MR. NORRIS: No, Your Honor.

19 THE COURT: Okay. And moving to Page 3 -- oh, you  
20 don't have to keep standing, so this is Charge Conference.  
21 So sometimes judges do this in chambers, so much more  
22 informal.

23 So Page 3, 1.05 Presumption of Innocence, Burden of  
24 Proof, Reasonable Doubt. Here, because defendant did not  
25 elect to testify, we have included the pattern insert — and

1 this is directly from the relevant 1.05 Fifth Circuit Pattern  
2 — and no inference whatever may be drawn from the election  
3 of a defendant not to testify. So in your version we have  
4 inserted that language.

5 With that insertion, does the Government have any  
6 objection to the proposed jury charge as it appears on  
7 Page 3?

8 **MS. BURCH:** No, Your Honor.

9 **THE COURT:** And does the Defendant have any  
10 objection to the proposed jury charge as it appears on  
11 Page 3?

12 **MR. NORRIS:** No, Your Honor.

13 **THE COURT:** Okay. Page 4, 1.06 Evidence -  
14 Excluding What is Not Evidence. Does the Government have any  
15 objections to the proposed jury charge as it appears on  
16 Page 4?

17 **MS. BURCH:** No, Your Honor.

18 **THE COURT:** And does the Defendant have any  
19 objection to the proposed jury charge as it appears on  
20 Page 4?

21 **MR. NORRIS:** No, Your Honor.

22 **THE COURT:** Moving to Page 5, Page 5, 1.08 Evidence  
23 - Inferences - Direct and Circumstantial. Does the  
24 Government have any objection to the proposed jury charge as  
25 it appears on Page 5?

1           **MS. BURCH:** No, Your Honor.

2           **THE COURT:** Does the Defendant have any objections  
3 to the proposed jury charge as it appears on Page 5?

4           **MR. NORRIS:** No, Your Honor.

5           **THE COURT:** Now, Page 6. This is 1.09 Credibility  
6 of Witnesses. I'll just admonish you that it carries over  
7 onto a second page, so please pay attention to Page 6 and 7.

8           Here, the Court did not include the insert for  
9 defendant testimony because it did not happen, so that has  
10 been omitted from prior drafts. With that omission, does the  
11 Government have any objections to the proposed jury charge as  
12 it appears on Pages 6 and 7?

13           **MS. BURCH:** No, Your Honor.

14           **THE COURT:** Does the Defendant have any objections  
15 to the proposed jury charge as it appears on Pages 6 and 7?

16           **MR. NORRIS:** No, Your Honor.

17           **THE COURT:** Okay. Page 8, 1.10 Character Evidence.  
18 There has been some opinion testimony in this category, so  
19 the Court has included the 1.10 pattern on character  
20 evidence.

21           Does the Government oppose or object to any of the  
22 language appearing on Page 8 of the proposed jury charge?

23           **MS. BURCH:** No, Your Honor.

24           **THE COURT:** Does the Defendant object to any of the  
25 proposed language appearing on Page 8 of the proposed jury



1 charge?

2 **MR. NORRIS:** No objection.

3 **THE COURT:** Page 9, which reflects the Fifth  
4 Circuit Pattern language on 1.11 Impeachment By Prior  
5 Inconsistencies. Does the Government have any objections to  
6 the proposed jury charge appearing on Page 9?

7 **MS. BURCH:** No, Your Honor.

8 **THE COURT:** Does the Defendant have any objections  
9 to the language appearing on Page 9 of the proposed jury  
10 charge?

11 **MR. NORRIS:** No objection, Your Honor.

12 **THE COURT:** Okay. Now, because this case did  
13 involve prior convictions, or at least some testimony and  
14 evidence of prior convictions, which is more atypical, I have  
15 included 1.13, the pattern for Impeachment By Prior  
16 Conviction.

17 Please note the two names that were inserted.  
18 Shane Smith was convicted in 2019 of Wire Fraud, and Steven  
19 Reinhart was convicted in 2021 of Misprision of a Felony.  
20 Those should pair correctly with the witnesses who were  
21 subject to impeachment for reason of prior conviction.

22 Does the Government have any objection to the  
23 proposed language as it appears on Page 10 of the proposed  
24 jury charge?

25 **MS. BURCH:** No, Your Honor.

1           **THE COURT:** Does the Defendant have any objection  
2 to the language as it appears on Page 10 of the proposed jury  
3 charge?

4           **MR. NORRIS:** No objection, Your Honor.

5           **THE COURT:** Next, on Page 11, you'll see the  
6 general pattern language on expert opinion testimony. We've  
7 had a battle of experts in this case. Here, the parties I  
8 think agreed to delete the first sentence of the Fifth  
9 Circuit Pattern, but, otherwise, it reflects pattern language.  
10 Does the Government object to the language as it  
11 appears on Page 11 of the proposed jury charge?

12           **MS. BURCH:** No, Your Honor.

13           **THE COURT:** And does the Defendant object to the  
14 language as it appears on Page 11 of the proposed jury  
15 charge?

16           **MR. NORRIS:** Your Honor, I don't think we have an  
17 objection, but I just want to make sure that the record is  
18 clear.

19           I think we originally objected to the third  
20 paragraph of this instruction. Is that what the Court was  
21 referring to that was deleted, or was it something else, or  
22 am I looking at the wrong thing?

23           **THE COURT:** Okay. Let me track my notes here.  
24 It's 1.18 Expert Opinion Testimony. There was an insert to  
25 delete the first sentence, but I don't think there was an

1 entire paragraph.

2 I'm pulling up the Fifth Circuit Pattern  
3 electronically right now.

4 **(Attorneys' sotto-voce conference.)**

5 **THE COURT:** And, as a reminder, the patterns were  
6 changed in 2019, so let's all work from the updated version  
7 if we're going to start with the pattern.

8 Okay. So, by my recollection — and I think this  
9 is reflected in the draft that you're reviewing — the  
10 parties, one party or the other requested that we delete the  
11 first sentence, which would require insertion of witness  
12 names to this sentence. During the trial you heard the  
13 testimony of blank who expressed opinions concerning blank.

14 Rather than do that four times, at least the  
15 documents I had presented to chambers, just omitted that  
16 first sentence.

17 **MR. NORRIS:** We have no objection to that, Your  
18 Honor.

19 **THE COURT:** Okay. So you're fine -- even though  
20 that is a slight deviation from the pattern, it really only  
21 deals with the name of expert and subject matter. You're  
22 okay with that deletion?

23 **MR. NORRIS:** Correct, Your Honor.

24 **THE COURT:** Okay. So 1.18 Expert Opinion  
25 Testimony, that will be submitted as written in the proposed

1 jury charge.

2 Page 12, 1.19 On or About. This is the pattern  
3 language on that concept.

4 Does the Government have any objection to the  
5 language appearing on Page 12 of the proposed jury charge?

6 **MS. BURCH:** No, Your Honor.

7 **THE COURT:** Does the Defense have any objection to  
8 the language appearing on Page 12 of the proposed jury  
9 charge?

10 **MR. NORRIS:** No, Your Honor.

11 **THE COURT:** Next, on Page 13, you will see the  
12 pattern for Considering Only the Crimes Charged. This is the  
13 1.21 pattern.

14 Does the Government have any objections to the  
15 language appearing on Page 13 of the proposed jury charge?

16 **MS. BURCH:** No, Your Honor.

17 **THE COURT:** Does the Defendant have any objections  
18 to the language appearing on Page 13 of the proposed charge?

19 **MR. NORRIS:** No, Your Honor.

20 **THE COURT:** Next, moving to Page 14, this is the  
21 pattern -- I've read aloud at least this concept, if not  
22 these exact words, to the jury in explaining sentencing.  
23 This is the Fifth Circuit Pattern on punishment.

24 Does the Government have any objection to the  
25 language appearing on Page 14 of the proposed jury charge?

1 MS. BURCH: No, Your Honor.

2 THE COURT: Does the Defendant have any objection  
3 to the language appearing on Page 14 of the proposed jury  
4 charge?

5 MR. NORRIS: No, Your Honor.

6 THE COURT: On the next page, Page 15, you will see  
7 the Fifth Circuit Pattern 1.23 on Single Defendant - Multiple  
8 Counts.

9 Does the Government have any objection to the  
10 proposed language appearing on Page 15 of the proposed jury  
11 instruction?

12 MS. BURCH: No, Your Honor.

13 THE COURT: Does the Defendant have any objections  
14 to the language appearing on Page 15 of the proposed jury  
15 charge?

16 MR. NORRIS: No objection, Your Honor.

17 THE COURT: Okay. I believe we are now to the  
18 point where there is some disagreement, and this would begin  
19 with Page 16. The proposed insertion for Similar Acts.

20 Beginning with the Government, here, the Government  
21 requested this insertion based on the 2019 Fifth Circuit  
22 Pattern Jury Instruction.

23 I believe Defendant objected because 404(b)  
24 evidence was inadmissible and didn't anticipate that that  
25 would be presented at trial.

1 Ms. Burch, given how evidence was presented in this  
2 case, does the Government continue to request the Fifth  
3 Circuit Pattern on 1.32 Similar Acts?

4 **MS. BURCH:** Yes, Your Honor. The Government moved  
5 to admit Exhibits 48 and 51 under both theory of them being  
6 intrinsic to the offense, or alternatively under 404(b).

7 And, if my recollection is correct, the Court did  
8 find them to be intrinsic evidence and relevant evidence, but  
9 it alternatively admitted them under 404(b). And, if that's  
10 the case, then this instruction should remain.

11 If the Defense is willing to waive their challenge  
12 to those two exhibits as intrinsic evidence, then we would be  
13 happy to remove this instruction.

14 **THE COURT:** Okay. Mr. Norris, a response from the  
15 Defense?

16 **MR. NORRIS:** Yes, Your Honor. I mean, we maintain  
17 our written objection about 404(b).

18 Also, I think I'm going to disagree with Ms. Burch  
19 here. I thought the evidence -- the Court ruled on the  
20 evidence as being intrinsic, and that's why it came in. So  
21 if it's intrinsic, then it's not 404(b), and therefore there  
22 shouldn't be a 404(b) instruction I think would be the  
23 Defense's position.

24 **THE COURT:** Okay. So we may need to track the  
25 transcript to determine if it was admitted on the basis of

1 being intrinsic or subject to 404(b).

2 Let me do this. Let me confer with my law clerks  
3 and let us run a search on the LiveNote transcript and see if  
4 we can get to that point in the trial.

5 **(Court/law clerk sotto-voce conference.)**

6 **THE COURT:** Okay. My law clerk has checked his  
7 notes. It turns out we did both. The Court determined that  
8 it was intrinsic, and even if it weren't, it was admissible  
9 under 404(b).

10 For that reason, the Court will insert the proposed  
11 jury charge language that presently appears in bold on  
12 Page 16.

13 The Court overrules Defendant's objections for the  
14 reason stated, but I will allow you to make any final  
15 argument that you may need to make for appellate purposes.  
16 Mr. Norris?

17 **MR. NORRIS:** Your Honor, we have no further  
18 argument, just we stand by the objections we already made.  
19 Thank you.

20 **THE COURT:** Okay. I will incorporate those by  
21 reference, and I find that those arguments are preserved for  
22 appellate purposes.

23 The Court agrees with the Government because the  
24 ruling was on the basis of, first, that the evidence was  
25 intrinsic, but also the Court stated aloud that it would be

1 admissible under 404(b); otherwise, that alternative  
2 formulation on that ruling I think necessitates some  
3 explanation to the jury on how they should consider this  
4 evidence, and the Court will insert the requested language on  
5 1.32 Similar Acts.

6 Okay. Moving to Page 17, here, I believe the  
7 parties have communicated to the Court that they are -- that  
8 the Government intends to withdraw this negligence  
9 instruction. Am I correct about that?

10 MS. BURCH: No, Your Honor. The one that the  
11 Government intends to withdraw is the next one regarding  
12 financial institution.

13 THE COURT: Okay. So on negligence of the victim  
14 is not a defense, there is still some disagreement?

15 MS. BURCH: Yes, Your Honor.

16 THE COURT: Okay. Ms. Burch, I'll allow you to  
17 argue for the Government, and I would ask that you  
18 specifically address whether this is needlessly duplicative  
19 of the 1.40 instruction on materiality, and you may proceed.

20 MS. BURCH: Yes, Your Honor. This instruction is  
21 taken directly from *United States versus Davis* cited at the  
22 bottom, which did deal with materiality.

23 We would note that the Defense elicited evidence  
24 regarding due diligence from several of the bank witnesses  
25 suggesting that they had not been appropriately diligent;



1 also, suggesting that the loan drafter didn't do a good  
2 enough job drafting the loan, and that the expert witness  
3 gave the opinion that the loan agreement should have  
4 contained other provisions to prevent what actually happened  
5 here.

6 And, so for that reason, we believe that the  
7 instruction regarding carelessness and negligence -- and, of  
8 course, I would have no objection to taking out naivety or  
9 stupidity, but the carelessness and negligence does not  
10 excuse criminal conduct on the part of the defendant, and  
11 that the part about -- that second sentence could probably  
12 go.

13 But, with respect to at least that first sentence  
14 about carelessness and negligence, we think that the evidence  
15 elicited by the Defense goes specifically to the bank -- it  
16 was suggested that the bank was just that.

17 **THE COURT:** Okay. Understood. And I think some of  
18 those arguments may bleed into what is sometimes termed a  
19 ratification instruction. That's the next page. We'll  
20 address that at that time. The Court will table argument on  
21 that.

22 Here, the Court is persuaded that the 1.40  
23 instruction on Materiality, which already includes the  
24 following language, quote, in determining materiality, you  
25 should consider that naivety, carelessness, negligence, or

1 stupidity of a victim does not excuse criminal conduct, if  
2 any, on the part of the defendant.

3 I understand that that is paired with a heading  
4 relative to materiality, but it makes much of the same point.  
5 Why then -- why the need for a second instruction with a  
6 different heading?

7 **MS. BURCH:** Your Honor, after further discussion,  
8 we can agree to take out Page 17 with the agreement that that  
9 last sentence of Page 19 would stay in.

10 **THE COURT:** Okay. That is the Court's intention,  
11 because 1.40 Materiality is the exact pattern from the Fifth  
12 Circuit, so if we do the work there, I think we can avoid any  
13 potential duplication confusion.

14 Mr. Norris, it was your objection, so I'm assuming  
15 you agree with the Court's analysis?

16 **MR. NORRIS:** We do, Your Honor.

17 **THE COURT:** Okay. So, at this point, and to keep  
18 everybody on the same page, this is Page 17 of the proposed  
19 jury charge. It is in bold. It was disputed. The Court  
20 will not insert the proposed language reflected in that  
21 Page 17, which bears the header Negligence of the Victim is  
22 Not a Defense.

23 And the Court does intend to instead insert the  
24 1.40 Materiality language that appears later in the charge  
25 for the reasons stated.

1           Okay. Now, moving to Page 18, Financial  
2       Institution is the Victim of Bank Fraud, and I imagine I will  
3       hear some argument on this one.

4           Here, the Government is citing to *United States*  
5       *versus Aubin*, A-U-B-I-N, 87 F.3d 141, which cites the  
6       instances when the Court should give an instruction on  
7       ratification where defendants in financial crime cases allege  
8       that certain officers, directors, or employees directed the  
9       diversion of loan proceeds, and, depending on the evidence,  
10      which is now closed, I'll hear the Government's argument on  
11      that.

12          Here, I understand the Defendant to be arguing  
13      *United States versus Saks*. This is found at 964 F.2d 1514.  
14      And they're arguing specifically that *Saks* distinguishes  
15      *Aubin* because they're different statutes, essentially  
16      different subparts of the same 1344 statute.

17          Additionally, should this instruction be given, the  
18      Defendant will request follow-up language on good faith.

19          And, based on the Court's separate and independent  
20      review of Fifth Circuit precedent, it does appear, where this  
21      instruction is given, that there is a requirement of some  
22      language explaining actions in good faith without intent to  
23      defraud.

24          So, with that setup, I'll allow the parties now to  
25      argue this page of the proposed jury charge.

1 Ms. Burch, you may begin.

2 MS. BURCH: Your Honor, referring to Page 18, the  
3 Government and the Defense have agreed that that instruction  
4 is not necessary as no evidence was elicited that the actual  
5 bank was in on the fraud, and they all testified that they  
6 were not, and they --

7 THE COURT: Okay. This may be --

8 MS. BURCH: -- didn't ratify it in any way.

9 THE COURT: -- the Page 17 that I thought was  
10 agreed to. We just got the page number wrong. Okay. That  
11 is helpful.

12 Okay. So, Mr. Norris, I assume you agree?

13 MR. NORRIS: We agree, Your Honor.

14 THE COURT: Okay. So the Court is not inserting  
15 the proposed jury charge language appearing on Page 18  
16 bearing the heading Financial Institution is the Victim of  
17 Bank Fraud.

18 And the Government [sic] agrees with counsel for  
19 the Government and the Defendant that no testimony was  
20 elicited that would require such an instruction. Sometimes  
21 this pattern is referred to as a ratification instruction. I  
22 have not heard that evidence or testimony from either the  
23 Government or the Defendant, so I do not think this  
24 instruction is necessary.

25 Now, Page 19, this relates to the pattern

1 instruction on Materiality. This, I believe, is a straight  
2 copy from the Fifth Circuit 2019 Pattern.

3 Does the Government have any objection to the  
4 proposed jury charge language appearing on Page 19?

5 **MS. BURCH:** No, Your Honor.

6 **THE COURT:** Does the Defendant have any objection  
7 to the materiality language appearing on Page 19 of the  
8 proposed jury charge?

9 **MR. NORRIS:** No objection.

10 **THE COURT:** Okay. Moving to Page 20, which  
11 reflects the Fifth Circuit Pattern on "Knowingly" and the  
12 definition of knowingly.

13 Does the Government have any objection to the  
14 proposed language appearing on Page 20 of the proposed jury  
15 charge?

16 **MS. BURCH:** No, Your Honor.

17 **THE COURT:** Does the Defendant have any objection  
18 to the proposed language appearing on Page 20 of the proposed  
19 jury charge?

20 **MR. NORRIS:** No, Your Honor.

21 **THE COURT:** Okay. On Page 21 and Page 22, so be  
22 careful to follow to the subsequent page, is this Court's  
23 proposed language on 2.58B Bank Fraud. This tracks patterns  
24 and language used and affirmed by the Fifth Circuit.

25 Does the Government have any objection to the

1 language appearing on Pages 21 and 22 of the proposed jury  
2 charge?

3 **MS. BURCH:** No, Your Honor.

4 **THE COURT:** Does the Defendant have any objections  
5 to the language appearing on Pages 21 and 22 in the proposed  
6 jury charge?

7 **MR. NORRIS:** Your Honor, I think, again, I'm a  
8 little confused. We had a -- we filed a written objection to  
9 the definition of materiality that was, I think, in the  
10 original proposed jury charge here. We just wanted to -- the  
11 objection was that it didn't track with Pattern Jury Charge  
12 1.40. And, as I'm looking back over this, I am not sure if  
13 that's been altered to comport with our objection or left  
14 out, or if it's still in.

15 **THE COURT:** Okay. I'll give you a moment to confer  
16 with counsel. We've already agreed to 1.40 as appearing in  
17 the proposed charge.

18 I'll allow you to track word by word to make sure  
19 that you don't see any inconsistency between that  
20 instruction, which will be given without objection, and then  
21 what appears in 21 and 22.

22 **(Defense Attorneys' sotto-voce conference.)**

23 **THE COURT:** I believe it's consistent.

24 **MR. NORRIS:** Your Honor, I think I am wrong. We  
25 don't have an objection. It looks like it is consistent

1 after all.

2 THE COURT: Okay. I admire an attorney who says  
3 the words, I am wrong. And, again, because I have five kids,  
4 I also like it when kids say that as well.

5 So understood. And thank you for being diligent  
6 and double-checking.

7 So the Court will insert the language on 2.58B Bank  
8 Fraud as it appears on Pages 21 and 22 of the proposed jury  
9 charge.

10 Now, for the much disputed -- I think this is  
11 the -- probably the most disputed language for this Charge  
12 Conference, and we've done independent and separate research  
13 here in chambers to find the best authority.

14 I submitted -- so, here, we are addressing  
15 Unanimity of Theory. This is derived from the 1.27 Fifth  
16 Circuit Pattern. Obviously, there are frequently unanimity  
17 sections inserted. Here, this is a wrinkle on that.  
18 Unanimity of Theory where there might be some argument about  
19 elements as distinct from the means underlying the elements.

20 If parties refer to the note appearing in the 2019  
21 Fifth Circuit Pattern Charge, you'll see there the Fifth  
22 Circuit's explanation for how these controversies arrive on  
23 appeal. Of course, a jury must unanimously find each element  
24 of a crime beyond a reasonable doubt; that a federal jury  
25 need not always decide unanimously which of several possible

1 sets of underlying brute facts make up a particular element.

2 And this is particularly problematic in multi-count  
3 cases where jurors are then tasked with matching facts to  
4 elements in multiple counts, so this is why this has  
5 percolated through various iterations of appeal.

6 As an example, to tee this up for counsel, in that  
7 note, the Fifth Circuit explains: As this is a disagreement  
8 over means underlying a particular element of a crime, the  
9 juries need not unanimously agree whether a knife or a gun  
10 was used, as long as they unanimously agree the defendant had  
11 threatened force.

12 So, here, I'm going to need some help from counsel  
13 matching the elements to the means underlying the elements,  
14 and then whether we need a separate instruction.

15 I've instructed counsel to download and review the  
16 *United States versus Sila*, Case 978 F.3d 264. That's a 2020  
17 case. That is -- that follows the *Holley* case cited by the  
18 Defendant, and then the *Paulus* cited by the Government.

19 So, at this point, this is -- this is the fireworks  
20 segment of this Charge Conference, so just pretend you're at  
21 oral argument.

22 Ms. Burch, you may proceed with your theories on  
23 unanimity of theory.

24 **MS. BURCH:** Yes, Your Honor. The Fifth Circuit  
25 caselaw supports that the unanimity instruction is only



1 necessary when the -- as it relates to elements, and not as  
2 it relates to means.

3 And I would point out that on the Page 21, the very  
4 instruction before this, the Fifth Circuit Pattern says that  
5 the third element is that the scheme or artifice was  
6 executed, but then it says, by means of, and lists the three  
7 different means. And so those are not separate elements.  
8 Those are means of a single third element.

9 Furthermore, in *Sila*, it talks about how when you  
10 have these groups of like things together -- now, in *Sila*, it  
11 was referring to verbs. I will -- you know, I admit these  
12 were not verbs, but it talks about, you know, stealing and  
13 conversion being similar, or embezzlement, stealing,  
14 purloining, and conversion; that when those are all together  
15 and they are similar, that those are just different means of  
16 committing an offense. They are not separate elements.

17 And so I would also note that -- I just did a quick  
18 run, as fast as I could, through Fifth Circuit caselaw on  
19 1344(2), and I don't see any cases that pop up that treat  
20 those things as separate elements.

21 However, the Supreme Court in *Loughrin versus*  
22 *United States*. That's at 573 U.S. 351, and the pincite is  
23 355 through 56. That's a June of 2014 case. In that case,  
24 the Supreme Court says -- it's talking about what the  
25 elements of bank fraud are, and that case talks about at

1 least two separate elements, and it lists as the second  
2 element the scheme or artifice executed by means of, and it  
3 lumps those together again as means. It does not list those  
4 out as a separate element.

5 And so we think that the weight of the authority is  
6 that these different false and fraudulent pretences,  
7 representations, and promises are lumped together as means in  
8 the vast majority of the caselaw, and that, for that reason,  
9 the unanimity instruction is -- it's not warranted by Fifth  
10 Circuit precedent.

11 **THE COURT:** Okay. I'm going to pull that case. I  
12 did not have that, and this is 573 U.S. at 351?

13 **MS. BURCH:** Yes, 351, and the pincite is 355 to 56.  
14 And the case is not about means versus element. It's not --  
15 you know, it's not *Mathis* talking about that, but it lists  
16 out elements of bank fraud, and the way it does it suggests  
17 that these are means, Your Honor.

18 **THE COURT:** Wow. I can't avoid this exclusio unius  
19 thing that keeps recurring. This feels almost like a canon  
20 of construction question, so I'm interested in -- so that  
21 Supreme Court case is exactly the statute at issue here in  
22 the Reagor case. It's the same statute.

23 **MS. BURCH:** I don't have it printed out. I'm going  
24 to try to pull it up here.

25 **THE COURT:** 1344(2). And then I guess, as the

1 Indictment reads, and 2, that would be the aiding and  
2 abetting section that the Government --

3 MS. BURCH: It's 1344(2), which is the subset of  
4 1344 that's been charged. The "and 2" is 18 U.S.C. 2, which  
5 is aiding and abetting, which is a different --

6 THE COURT: Yes. I recall that those are always  
7 distinct and separate.

8 So 1344(2), I'm pulling up the case that you  
9 referenced. I'll ask Mr. Norris to gather his notes and  
10 arguments. And we'll do the work of matching elements as  
11 distinct from means underlying the element, and we'll figure  
12 this out together.

13 And is the case *Loughrin versus United States*?

14 MS. BURCH: Yes, Your Honor.

15 THE COURT: Okay. And pincite is 355?

16 MS. BURCH: Yes, Your Honor.

17 THE COURT: Okay.

18 MS. BURCH: I direct the Court under II where it  
19 goes into the Roman Numeral II.

20 THE COURT: Yeah.

21 MS. BURCH: And it talks about common ground, and  
22 we agree that the elements are, and it says, first -- now,  
23 this case is talking about whether there's an intent element,  
24 but it says, first, the clause that the defendant intend to  
25 obtain money, and then it says, second, the clause requires

1 the envisioned result by means of false or fraudulent  
2 pretences, representations, or promises, and it doesn't list  
3 those out as separate elements. And the way that it's  
4 grouped those together suggests that the Supreme Court sees  
5 those as means. That's the Government's argument, Your  
6 Honor.

7 **THE COURT:** Okay. So I'm tracking now with you.  
8 It's 356 pinpoint requires proof, quote, by means of false or  
9 fraudulent pretenses, representations, or promises. It --  
10 oh, and then it goes on to say, petitioner does not contest  
11 the jury instructions on either of those two elements.

12 **MS. BURCH:** Correct. I think this suggests that  
13 the Supreme Court sees this fraud as having two main elements  
14 with those three listed out as means of committing that  
15 element.

16 Now, the Fifth Circuit breaks it down into four,  
17 but, again, the third element is that the scheme or artifice  
18 was executed, and then they even in the Fifth Circuit Pattern  
19 still use the phrase "by means of," which to me indicates  
20 that those are means and not separate elements.

21 **THE COURT:** Okay. And I know we've already been  
22 through some charge language on this. We are applying here  
23 18 U.S.C. Section 1344(d) [sic]. We're trying to distinguish  
24 elements from means underlying the element.

25 Here, the Supreme Court is referencing as means the

1 following: False or fraudulent pretenses, representations,  
2 or promises. What does the Fifth Circuit list for those  
3 means?

4 **MS. BURCH:** The third -- I'm sorry, the pattern  
5 jury instruction for the third element says, the scheme or  
6 artifice was executed by means of false or fraudulent  
7 pretenses, false or fraudulent representations, or false or  
8 fraudulent promises, and then in the fourth element goes on  
9 to say that those false or fraudulent pretenses,  
10 representations, or promises were material.

11 And I think the way that those are grouped in both  
12 the third and fourth element suggests that those are means  
13 and not separate elements.

14 **THE COURT:** Okay. You're confusing the Court  
15 because --

16 **MS. BURCH:** I'm sorry.

17 **THE COURT:** -- you're using elements, which here  
18 can have double meaning in a way that's material to the  
19 analysis. So, here, the means identified are false or  
20 fraudulent pretense --

21 **MS. BURCH:** False or fraudulent --

22 **THE COURT:** -- representation --

23 **MS. BURCH:** I'm sorry.

24 **THE COURT:** -- or promise.

25 **MS. BURCH:** In the Fifth Circuit Pattern

1 instruction, it lists four elements to bank fraud, four  
2 separate elements.

3 In the third element, it lists that the scheme or  
4 artifice was executed by means of, and here are the means,  
5 false or fraudulent pretenses, false or fraudulent  
6 representations, or false or fraudulent promises.

7 **THE COURT:** Okay. So the three means are the same,  
8 fraudulent or false pretences, representations --

9 **MS. BURCH:** Correct.

10 **THE COURT:** -- or promises?

11 **MS. BURCH:** And then I would also indicate -- I'm  
12 sorry, sorry. I would also let the Court know that on the  
13 fourth element of bank fraud in the pattern jury instruction,  
14 so now not the third element, now onto the fourth element of  
15 bank fraud, that the Fifth Circuit says that the false or  
16 fraudulent pretenses, representations, or promises were  
17 material. So, again, in both the third element and the  
18 fourth element, they group those three different means.

19 **THE COURT:** Okay. I have your argument. And I now  
20 have a printout of the case we're referring to.

21 Ms. Burch, here, I imagine the relevant event or  
22 occurrence, at least as a factual predicate, is really going  
23 to turn on these two disbursements as the jury is trying to  
24 apply the charged language on the elements of bank fraud.

25 And, again, I don't think the parties are disputing

1 this instruction on Count Three. This really just goes to  
2 Count One and Two.

3 As I used to argue unanimity, there can be minor  
4 disagreements on dates and things like that as long as the  
5 event or occurrence is the same. Here, we've heard a lot of  
6 language and testimony and evidence about these two  
7 disbursements which combined total about 1.7 million.

8 As we have agreed on the Count One, Count Two  
9 charge to the jury, is there any concern that the fact that  
10 we're dealing with two disbursements might require additional  
11 definition as appears in the proposed unanimity of theory  
12 language?

13 **MS. BURCH:** No, Your Honor. Those counts are each  
14 charged as separate counts, so there's only one date that  
15 goes to Count One; there's only one date that goes to Count  
16 Two. If they can't agree on Count One, then they find the  
17 defendant not guilty on Count One.

18 **THE COURT:** And here --

19 **MS. BURCH:** If they agree on Count Two --

20 **THE COURT:** And, here, I think we're guided by *Sila*  
21 where there was a similar dispute about competing fraudulent  
22 events, or at least there was some argument by counsel there  
23 was some evidence that there was a Kenya transaction and a  
24 Dallas transaction.

25 The Court -- the Fifth Circuit, my boss, in that

1 case found, looking back to the Indictment, that because it  
2 was charged with specific approximate date ranges, and that  
3 chronology was distinct per count, we didn't have the  
4 unanimity confusion, at least as to the factual predicate for  
5 the event or occurrence relevant to each count.

6 So, here, as reflected in the Indictment, Page 5,  
7 the Government has separately charged Count One with an  
8 approximate date of July 14, 2017. The deposit is materially  
9 different as to amount as to, you know, that number which  
10 appears there, \$766,277.77.

11 The account is same, but there's enough material  
12 difference between Count One and Count Two and with specific  
13 attention to the approximate date, and then the deposit  
14 amount, I think it's very similar to the *Sila* case where that  
15 chronology, as it appears in the Indictment and the dating of  
16 those counts --

17 And, again, here, Count Two then lists an  
18 approximate date of February 28, 2018, with a deposit amount  
19 of \$1,000,000.

20 So both the approximate date and the deposit amount  
21 are distinct, the date ranges are affixed to each count, and  
22 if you combine that then with the *Loughrin* case from the  
23 Supreme Court, and the very persuasive argument that they  
24 list elements as distinct from means, that parallels very  
25 much the Fifth Circuit listing of means, I don't think we



1 have much potential for unanimity of theory concerns.

2 And I'm disinclined to do anything but the standard  
3 pattern, but I'll hear your arguments, Mr. Norris.

4 **MR. NORRIS:** Thank you, Your Honor. Yeah. We  
5 would re-urge the arguments made in our written objections,  
6 Your Honor, and urge the Court to follow the *Holley* case.

7 I think we would distinguish -- we recognize the  
8 Court gave us this *Sila* case. Our position is that this is  
9 not a bank fraud case. The Fifth Circuit really has not  
10 spoken on a case like Mr. Reagor's in the bank fraud context,  
11 so we would urge the unanimity of theory instruction and  
12 stand on our objection.

13 **THE COURT:** Okay. I'll permit a sur-reply from  
14 Ms. Burch explaining why *Holley* doesn't dictate that result  
15 here.

16 **MS. BURCH:** Yes, Your Honor. My understanding of  
17 *Holley* is that in the indictment there were multiple  
18 statements charged for each count of the indictment, and so  
19 when it went to the jury, they didn't have to agree on which  
20 statements were perjurious.

21 That's very different than what we have here where  
22 we have two separate counts. We've charged one thing in  
23 Count One. We've charged something totally different -- I  
24 mean, it's the same offense, but it's a different date, it's  
25 a different amount of money, it's just separate, we've

1 charged as a separate offense. We did not take both of those  
2 and throw them into one count and say, you guys sort it out.  
3 We've given them the opportunity to separately consider each  
4 of those events, which is different from *Holley*.

5 **THE COURT:** And it's thus arguably distinct from  
6 the *Richardson* case cited in the Fifth Circuit note where the  
7 statute itself created the confusion by allowing series of  
8 violations language.

9 Here, because the elements allow for a distinct  
10 pairing with the offense date on or about Count One, the  
11 offense date on or about Count Two, this is much closer to  
12 the *Sila* case even though that *Sila* case is dealing with a  
13 different statute.

14 Oh, yay, this Court has stumbled into another case  
15 of first impression. So I'm going to side with the  
16 Government on this instruction question.

17 I think the parties have done an exemplary job in  
18 briefing the issue and bringing to bear the relevant caselaw.  
19 Defendant has received capable and effective representation  
20 on this point. The Government also has discharged its duty  
21 to brief the Court.

22 But we have found a bit of a wrinkle. There just  
23 isn't the 1344(2) definitive case from the Fifth Circuit, so  
24 we must argue by analogy. Here, the Court is arguing by --  
25 or the Court is persuaded by the Government's argument by

1 analogy to *Loughrin versus United States*, 573 U.S. 351, and  
2 then also the *Sila* case from the Fifth Circuit, which deals  
3 with some of the dating issues as elements are matched to  
4 means underlying the element, and I'm persuaded that we  
5 need -- needn't insert the unanimity of theory instruction,  
6 but good argument all around.

7 Let me briefly confer with my clerks about what  
8 happens next now that we've argued and made that ruling.

9 **(Court/law clerk sotto-voce conference.)**

10 **THE COURT:** Okay. So I'm assuming -- I'm assuming  
11 at this point, both parties -- where we have 1.27 marked, and  
12 this is Page 23 in the proposed jury charge, we would just --  
13 given the Court's ruling, just instead insert the pattern on  
14 unanimity? Is that what the Government requests given the  
15 ruling?

16 **MS. BURCH:** No, Your Honor. The Government doesn't  
17 think we need an unanimity instruction at all.

18 **THE COURT:** Okay.

19 **MS. BURCH:** It's only those three offenses charged,  
20 and there's only one way they've all been alleged to have  
21 been committed.

22 **THE COURT:** Okay. And from the Defense?

23 **MR. NORRIS:** Your Honor, of course, we are still  
24 standing by our objection requesting, you know, the full 1.27  
25 unanimity of theory instruction, but since the Court has

1 ruled against us on that, yes, we would still request, I  
2 guess, the pattern instruction.

3 We believe, obviously, that the way this case was  
4 charged and the way the evidence came forth at trial, that  
5 some instruction of unanimity is still warranted.

6 **THE COURT:** Okay. And let me explain, Mr.  
7 Norris -- let me better understand the language that was  
8 submitted by the Defendant here on unanimity of theory.

9 Is this lifted from a Section 1344(2) case that you  
10 were able to find where this was charged, or is this directly  
11 from the Fifth Circuit Pattern? And I can pull that up, if  
12 necessary.

13 **MR. NORRIS:** Your Honor, I believe the language we  
14 requested was lifted straight from the Fifth Circuit Pattern.

15 **THE COURT:** Okay. Let me double-check that. It's  
16 1.27?

17 **MR. NORRIS:** Yes, Your Honor.

18 **THE COURT:** Okay.

19 And, Ms. Burch, refresh my recollection, we've been  
20 through a lot these last two days.

21 **MS. BURCH:** I'm trying to pull it, Your Honor.

22 **THE COURT:** No. I have 1.27. We have already  
23 agreed to a separate instruction on multiple counts; is that  
24 correct?

25 **MS. BURCH:** Yes, that's correct, Your Honor.

1           **THE COURT:** Okay. Could you -- I believe we've  
2 already done that work.

3           **MS. BURCH:** It's 1.23, Single Defendant - Multiple  
4 Counts on Page 15.

5           **THE COURT:** Okay. And we've already agreed to  
6 that.

7           Okay. At this point, we're probably going to have  
8 to make sausage. I am concerned because it's a multi-count  
9 case where there are multi-elements and different means  
10 identified, so if we don't use something like the 1.27  
11 unanimity of theory instruction, I think we need something  
12 closer maybe to the general pattern.

13           So, Mr. Norris, going back to what you submitted,  
14 Paragraph 2, Count -- and I think some of the problem here is  
15 for efficiency we've -- or Defense Counsel combined Count One  
16 and Two into a single paragraph, but if we work together and  
17 maybe break that out.

18           So Counts One and Two of the Indictment accuse the  
19 defendant of committing the crime of bank fraud in three  
20 different ways, but I think it just repeats itself three  
21 times. The first is that the defendant committed bank fraud  
22 by means of false or fraudulent pretenses. The second is  
23 that the defendant committed bank fraud by means of false or  
24 fraudulent pretenses -- oh, representations. Okay. Sorry, I  
25 misread that the first time.

1           **MR. NORRIS:** Yes, Your Honor.

2           **THE COURT:** And the third is that the defendant  
3 committed bank fraud by means of false or fraudulent  
4 promises.

5           Okay. So those are the three means that are  
6 identified by the Fifth Circuit precedent we've been  
7 discussing and is also analogous to that Supreme Court case  
8 from earlier.

9           If we were -- I'd hate to make it longer, but if we  
10 were to create essentially two paragraphs, Count One, then  
11 Count Two, and then do that listing, that might cure my  
12 confusion.

13           **MS. BURCH:** Your Honor, I must -- I must be not  
14 following the Court because I'm not understanding. My  
15 understanding is that we just established that those three  
16 things were means, and because they're means, they don't  
17 require unanimity.

18           The other three separate counts are charged as  
19 separate counts of the Indictment, and the Court's  
20 instruction to that, to -- the instructions require that they  
21 be unanimous as to a verdict on all three counts, so I just  
22 don't see a place where unanimity of theory even fits into  
23 any of those offenses.

24           **THE COURT:** Okay. I didn't recall that we had --  
25 I've been through several versions of this unanimity fight as

1 a prosecutor. Did we have the 1.26 instruction, or does it  
2 follow such that I can allay any concerns that jurors are  
3 getting confused on what they must find.

4 Okay. So this is it. It's at Page 28 of the  
5 proposed jury charge.

6 **MS. BURCH:** The 1.26 is the Duty to Deliberate, and  
7 it requires the foreperson to write the unanimous answer of  
8 the jury in the space. Is that what you're referring to?

9 **THE COURT:** Yes. So I think that's the only other  
10 instance where like we're adamant to the jurors, and then we  
11 give them a verdict form count by count, of course.

12 I do want some instruction on a unanimous verdict.  
13 I know that's distinct from unanimity. Just because this is  
14 a multi-count case. So we have the instruction on multi-count  
15 case. We have the duty to deliberate instruction.

16 I guess we're just down to this unanimity of  
17 theory. Okay. I had not been that far forward in the  
18 charge.

19 So, Ms. Burch, would it be the Government's  
20 argument, based on the finding and the ruling, that 1344(2)  
21 by analogy to the Supreme Court's analysis in the *Loughrin*  
22 case doesn't require the sort of breaking apart of elements  
23 and means underlying that is suggested in that 1.27 unanimity  
24 of theory instruction that the Defendant has proposed?

25 **MS. BURCH:** That's correct, Your Honor. The

1 elements of the offense are broken apart, and the prior  
2 instruction that tells the jury what elements they have to  
3 find, and these that they lay out here are means based on  
4 those cases that we just discussed.

5 **THE COURT:** Okay. Mr. Norris, one final argument,  
6 and then I'm prepared to enter a final ruling, and I do  
7 appreciate counsel for being very diligent on pulling all the  
8 appropriate case law.

9 **MR. NORRIS:** Yes, Your Honor. Thank you. We stand  
10 by the -- you know, the briefed objections as well as what we  
11 previously stated, and we believe -- we still believe that  
12 1.27, the pattern Fifth Circuit jury instruction on unanimity  
13 of theory should be included.

14 **THE COURT:** Okay. The Court, although there is no  
15 current Fifth Circuit case that does this analysis comparing  
16 elements and means underlying each element on Section 1344(2)  
17 specifically, the Court does continue to agree with the  
18 Government by analogy to the *Loughrin* case and the *Sila* case  
19 that this is not necessary in this case, and with particular  
20 emphasis on the approximate dates and deposit amounts that  
21 are referenced in the Indictment.

22 I actually think the unanimity of theory  
23 instruction here would create more confusion. I had to read  
24 it three times to identify pretenses, representations, and  
25 fraudulent promises, and I've argued unanimity several times



1 in other context. So I actually think it would further  
2 confuse the jury to insert 1.27 in this case, and I do find  
3 *Loughrin* and *Sila* persuasive. The Court will not insert that  
4 requested instruction.

5 So that brings us to Page 24. This should be the  
6 straight Fifth Circuit Pattern. And let me get my notes back  
7 together. 2.47 False Statement to a Bank. And we're on  
8 Page 24 of the proposed jury charge.

9 Does the Government have any objection to the  
10 language proposed on Page 24 --

11 **MS. BURCH:** No, Your Honor.

12 **THE COURT:** -- of that proposal?

13 Okay. Does the Defendant have any objection to the  
14 proposed language on Page 24 regarding False Statement to a  
15 Bank?

16 **MR. NORRIS:** No, Your Honor.

17 **THE COURT:** Okay. That will be inserted.

18 Now, Page 25, which refers to aiding and abetting.  
19 As it appears in the Indictment, the Government did charge a  
20 violation of 18 U.S.C. Section 2.

21 Ms. Burch, I will now allow the Government to argue  
22 the necessity of this instruction.

23 **MS. BURCH:** Yes, Your Honor. The Government did  
24 charge both offenses with the aiding and abetting language.  
25 The Defense objected on the basis of unfair surprise. I

1 don't think that, because it was charged in the Indictment,  
2 that it could be an unfair surprise, and there are specific  
3 language in there about --

4 **THE COURT:** This is the good faith instruction that  
5 follows?

6 **MS. BURCH:** This is the aiding and abetting  
7 instruction, Your Honor, on Page 25 and 26. We believe that,  
8 because we charged aiding and abetting in the Indictment as a  
9 theory of conviction, that this lang -- that this instruction  
10 should be given.

11 **THE COURT:** Okay. I was jumping ahead a little  
12 bit.

13 **MS. BURCH:** Sorry.

14 **THE COURT:** Yes, I understand. And I did check the  
15 Indictment to make sure it included the magic words "and 2."

16 **MS. BURCH:** "And 2."

17 **THE COURT:** As it does appear in the charging  
18 instrument. Now I'm referring to Page 27, which is the good  
19 faith instruction.

20 **MS. BURCH:** Your Honor, my understanding was that  
21 the Defense was objecting to the inclusion of Pages 25 and  
22 26, so that's why I thought the Court was asking --

23 **THE COURT:** No, I'm --

24 **MS. BURCH:** -- me about that.

25 **THE COURT:** -- asking for your position on Page 27.

1           **MS. BURCH:** Okay. All right. Yes, Your Honor, for  
2 good faith, the Government does not believe that that  
3 instruction is warranted.

4           There was no evidence presented here in this  
5 courtroom that Mr. Reagor was acting in good faith prior to  
6 the disbursement of the loans. He didn't ask anybody whether  
7 he could do it. He instead sent an e-mail saying to hide it.

8           And all of the evidence that came in about whether  
9 working capital is or isn't -- what it is or what it isn't  
10 was brought to us by experts hired within the last three  
11 weeks, not anything that he actually relied on or believes in  
12 terms of when he made the decision to misrepresent to IBC  
13 Bank that the loans would be used for working capital.

14           **THE COURT:** Okay. I'll turn now to Mr. Norris.  
15 It's my understanding that Defendant objects based on unfair  
16 surprise. How were you unfairly surprised by something that  
17 was charged in the Indictment?

18           **MR. NORRIS:** Well, Your Honor, I think I'm a little  
19 confused again. Are we on Page 27 and the good faith  
20 instruction, because it sounds like that's what Ms. Burch was  
21 just arguing?

22           **THE COURT:** Well, we're arguing all of them.

23           **MR. NORRIS:** Oh, okay.

24           **THE COURT:** Page 25, 26, and 27.

25           **MR. NORRIS:** Okay.

1           **THE COURT:** I believe Defendant requested Page 27.  
2 Right now, and with fairness, I combined them with my  
3 colloquy with Ms. Burch, so this is probably my fault.

4           Let's just focus now on Pages 25 and 26.

5           **MR. NORRIS:** Okay.

6           **THE COURT:** The charging instrument does reflect on  
7 Page 5 a violation of 18 U.S.C. Sections 1344(2) and 2. So  
8 this is a reference to 18 U.S.C. 2 or Section 2, which is the  
9 aiding and abetting statute.

10           It was my understanding that Defendant objects to  
11 Pages 25 and 26 on the basis of unfair surprise, and you  
12 might imagine the Court needs to hear argument on how  
13 Defendant was unfairly surprised by a section that was  
14 referenced in the Indictment.

15           **MR. NORRIS:** Sure, Your Honor. I'd also like to --  
16 because it sounds like Ms. Burch kind of went there on good  
17 faith in terms of that wasn't raised within the evidence, I  
18 think that would also be our position regarding Pages 25 and  
19 26.

20           In Instruction 2.04, I don't see how the aiding and  
21 abetting, although it was charged in the Indictment, was  
22 raised by any of the evidence. The only evidence potentially  
23 on that was the testimony of Shane Smith, and I don't -- I  
24 don't see where that raises any suggestion that Bart Reagor  
25 aided and abetted Shane Smith on the IBC loan fraud with

1 which he is charged in this case.

2 **THE COURT:** Okay. Ms. Burch, a reply?

3 **MS. BURCH:** Yes, Your Honor. The plain language of  
4 the proposed instruction says that the guilt of a defendant  
5 can be established without proof that the defendant  
6 personally did every act constituting the offense alleged.

7 And I believe the evidence was that the defendant  
8 sent an e-mail directing Mr. Smith to divert loan proceeds,  
9 and also that he -- that anything he does with the direction  
10 of another person or acting as his agent or in concert with  
11 is part of a joint enterprise.

12 And so I think the evidence does warrant this  
13 instruction, and also the -- that the fact that that might be  
14 a theory of -- a theory of criminal responsibility in this  
15 case has been noticed from the very beginning.

16 **THE COURT:** Right. And 18 U.S.C. Section 2 reads  
17 as follows, and its header is Principals. Section (a)  
18 Whoever commits an offense against the United States, or  
19 aids, abets, counsels, commands, induces or procures its  
20 commission, is punishable as a principal; and

21 (b) Whoever willfully causes an act to be done,  
22 which if directly performed by him or another would be an  
23 offense against the United States, is punishable as a  
24 principal.

25 So that statute has been in effect since roughly

1 the 1950's. It was charged in the Indictment.

2 And am I correct, Ms. Burch, that this is a  
3 straight copy of the Fifth Circuit Pattern 2.04 on Aiding and  
4 Abetting?

5 MS. BURCH: Yes, Your Honor.

6 THE COURT: Okay. The Court will insert Pages 25  
7 and 26 as that language appears in the proposed jury charge  
8 for the reasons stated by the Government, and the Court's  
9 separate and independent judgment that evidence and testimony  
10 did implicate defendant's role vis-à-vis Shane Smith, and --

11 MS. BURCH: Your Honor, can I make one caveat  
12 that you asked me if this is the exact version; it is except  
13 that we included the bank fraud language because this offense  
14 was the bank fraud, and the mis -- I'm sorry, the --

15 THE COURT: False statement.

16 MS. BURCH: -- false statement to the bank, so with  
17 that, I just want -- I don't want to mislead the Court. That  
18 was included, but it's included at the direction of the  
19 pattern instruction on Page 26.

20 THE COURT: Thank you. That was --

21 MS. BURCH: Does that make sense?

22 THE COURT: That was assumed, but --

23 MS. BURCH: Okay.

24 THE COURT: -- yes, it's now been made expressed,  
25 so thank you for being so diligent and forthright and candid

1 with the Court. Yes, that's the Court's understanding that  
2 those are appropriate inserts based on Counts One, Two, and  
3 Three.

4 So with that, it's a straightforward application of  
5 the pattern. The Court will include Page 25 and 26. The  
6 language appearing at those pages in the proposed jury charge  
7 will appear in the final charge.

8 Now, what remains is Page 27, the good faith  
9 instruction. It's my understanding that, here, Defendant has  
10 requested Page 27 under *United States versus Harris*, 821 F.3d  
11 589, 601.

12 The Court always -- I'm sorry, the Court also notes  
13 a reference to *United States versus Beebei*, B-E-E-B-E-I,  
14 792 F.2d 1363.

15 Here, the Government responds that this good faith  
16 instruction is not necessary in this case because other  
17 portions of the jury charge cover the concept.

18 So I'll allow the parties to argue the good faith  
19 instruction as it appears on Page 27. Ms. Burch?

20 **MS. BURCH:** Yes, Your Honor. In the cases the  
21 Government cited, the Fifth Circuit has held that, because  
22 other portions of the pattern jury charge, including the  
23 portions of the charge that require intent and other type  
24 portions of the charge, substantially cover this, that the  
25 good faith element -- I mean, the good faith instruction is

1 just repetitive, and it's unnecessary, and has a tendency to  
2 confuse the jury.

3 The jury will already be charged that the defendant  
4 must act knowingly to execute his scheme and artifice to  
5 defraud. And the bank fraud statute -- I mean, the bank  
6 fraud instruction goes into more detail about that regarding  
7 when representations and promises are false or omit material  
8 facts.

9 And so the idea that somebody could -- I just think  
10 it has the potential to mislead the jury, and the Fifth  
11 Circuit cases indicate that other portions of the charge just  
12 cover it enough that there's no need to give that  
13 instruction.

14 And I also reiterate our information to the Court  
15 that there was no evidence presented that Mr. Reagor acted in  
16 good faith. There might have been evidence presented that he  
17 didn't know, or he was confused, or, gosh, I didn't know, but  
18 there was no evidence that he -- that he actually truly, you  
19 know, believed it was all fine.

20 **THE COURT:** Right. I understand the nature of that  
21 argument. And I believe you quoted -- I'm sorry, you cited  
22 *United States versus Morrow*, 177 F.3d 272, a Fifth Circuit  
23 case from 1999, and the *Giraldi* case, G-I-R-A-L-D-I, 86 F.3d  
24 1368. That's a 1996 Fifth Circuit case.

25 Those stand for the general proposition that this



1 separate good faith instruction need not be given because the  
2 concept is adequately covered in the pattern instructions,  
3 and specific here a knowingly requirement.

4 Are either the *Morrow* or *Giraldi* cases a  
5 Section 1344 case or a false statement case?

6 **MS. BURCH:** Your Honor, I'm going to have to look  
7 that up real quick because I just don't remember.

8 **THE COURT:** Okay. Why don't you do that. And then  
9 while you're referencing the two cases that you cited, I'll  
10 now hear argument from Mr. Norris on the proposed good faith  
11 instruction as it appears on Page 27 of the jury charge.

12 **MR. NORRIS:** Yes, Your Honor, that proposed  
13 instruction I believe we pulled directly from the Fifth  
14 Circuit caselaw that was cited.

15 Also, we, obviously, disagree with Ms. Burch's  
16 contention that the term "knowingly" also encompasses good  
17 faith. I don't think the cases that she cites are on point  
18 from the Fifth Circuit.

19 Also, particularly as it pertains to this case, we  
20 clearly raised a good-faith defense that's separate and apart  
21 from just saying that, oh, I didn't knowingly do it. At  
22 least half of the defensive case was about how Mr. Reagor  
23 relied on the reports of Shane Smith about the nature -- the  
24 condition of his company. He relied on his CFO when he  
25 e-mailed the -- the very e-mail that Ms. Burch cites about,

1 well, Mr. Reagor just directed Shane Smith to do that.

2 Well, no, he didn't, because, as we saw in that  
3 response, which I believe was Government's Exhibit 42, Shane  
4 Smith, a CFO, on whom he was relying, said, awesome. And as  
5 the Court, I'm sure, is aware Mr. Cogdell cross-examined Mr.  
6 Smith extensively on that.

7 So, yes, I do think good faith was absolutely  
8 raised, and not just raised, but it was at least half of our  
9 defensive case. And the mere mention of knowingly and  
10 materiality within the bank fraud instruction does not  
11 adequately cover the good-faith defense.

12 **THE COURT:** Okay. And the two cases that you cite  
13 to the Court, I believe it's the *Harris* case and then the  
14 *Beebei* case, are those 1344(2) cases?

15 **MR. NORRIS:** I'm not sure, Your Honor. We are  
16 going to have to Lexis that as well. I apologize to the  
17 Court.

18 **THE COURT:** Okay. So --

19 **MS. BURCH:** Your Honor, *Morrow* is a bank fraud  
20 case, but I'm trying to -- it specifically says 1344, but it  
21 looks like it might be 1344(1) instead of (2), but, in any  
22 event, the discussion regarding good faith, which appears  
23 further down here, talks about how the instructions on bank  
24 fraud and on knowingly, as well as allowing the Defense to  
25 argue good faith, was sufficient to cover that --

1 THE COURT: And to be --

2 MS. BURCH: -- that theory.

3 THE COURT: And, to be clear, the spacing of the  
4 document might have led to some confusion. Is Page 27 the  
5 pattern for 2.04? Is it the pattern to include aiding and  
6 abetting, followed by the good faith instruction that  
7 follows, or is that a separate section that the Defendant has  
8 requested?

9 MS. BURCH: It's a separate section that the  
10 Defendant requested.

11 THE COURT: Okay. So it is not paired just  
12 because --

13 MS. BURCH: It is not paired --

14 THE COURT: -- of the way my printout worked.

15 MS. BURCH: -- with the aiding and abetting  
16 pattern.

17 THE COURT: Okay. I have not seen it before, but  
18 the way this was printed, it appeared that it was a  
19 continuation of 2.04, and I could not find that. So that  
20 explains some of the confusion.

21 I will take Page 27 under advisement.

22 Mr. Norris, any additional argument from the  
23 Defendant on, you know, your construction of *United States*  
24 *versus Harris* and then the *Beebei* case that you've also  
25 cited?

1           **MR. NORRIS:** Yes, Your Honor. Specifically, *U.S.*  
2     *v. Harris*, that was a wire fraud case under 18 U.S.C. 1343,  
3     and I'm just going to -- if I may, I'm going to quote to that  
4     opinion from the Fifth Circuit. I'm sorry, Your Honor

5           **(Defense attorneys' sotto-voce conference.)**

6           **MR. NORRIS:** What is *Beebee* (phonetic)?

7           **MR. PAYNE:** Also a wire fraud.

8           **MR. NORRIS:** Okay.

9           **THE COURT:** He was a wide receiver for the Buffalo  
10    Bills when they lost to the Cowboys in the Super Bowl, Don  
11    Beebe.

12          **MR. NORRIS:** So I probably --

13          **THE COURT:** I don't think -- I don't think that's  
14    the defendant in *United States versus Beebay* (phonetic).

15          **MR. NORRIS:** Oh, okay. Well, is this the *Beebei*  
16    case or no?

17          **THE COURT:** *Beebei*.

18          **MR. NORRIS:** Okay. So I'm quoting from *Beebei*,  
19    Your Honor. The parties agree that the applicable law in  
20    this circuit establishes that an accused is ordinarily  
21    entitled to a good-faith defense instruction when intent to  
22    defraud is an element of the offense charged, and the defense  
23    is fairly raised by the evidence. And then it cites two  
24    other Fifth Circuit caselaw, *U.S. v. Goss*, *U.S. v. Fowler*.

25                So I think that, although these were wire fraud

1 cases, it does -- it does match up with the fact that a false  
2 statement is again charged here. So really the question just  
3 becomes: Was the good-faith defense raised by the evidence?  
4 I think absolutely it was, like I said. I won't rehash  
5 everything I said, but half of our defensive case was  
6 basically that he relied on his CFO, which is perfectly  
7 reasonable and in good faith.

8 **THE COURT:** Okay. And any additional argument  
9 on -- there obviously is a potential difference between a  
10 good-faith defense and then just various references to other  
11 people being responsible and delegation and the rest.

12 Any additional argument from the Defendant on the  
13 evidence that reflects the good-faith defense contemplated by  
14 this instruction and how the Defendant put that case forward?

15 Obviously, the defendant did not testify in this  
16 case. We didn't hear, you know, the words "good faith," but  
17 obviously it can be asserted different ways.

18 So can you point to me your best argument on which  
19 evidence reflects the presentation of a good-faith defense.

20 **MR. NORRIS:** Yes, Your Honor. I think the  
21 cross-examination of Shane Smith. I think I already kind of  
22 mentioned that, but Government's Exhibit 42, Mr. Reagor is  
23 not just directing Shane Smith in that e-mail; he's, in  
24 effect, saying, here's my plan and offer -- and soliciting  
25 advice on what Mr. Smith thought, and apparently what Mr.

1 Smith thought was awesome.

2 Mr. Smith was cross-examined extensively on that.  
3 I think similarly -- well, yeah, I think particularly the  
4 cross-examination of Mr. Smith, Your Honor, is the evidence  
5 that was educed on that.

6 **THE COURT:** Okay. And I can -- I can review the  
7 LiveNote transcript of that for that evidence.

8 Ms. Burch, one final sur-sur-reply from the  
9 Government on this good faith instruction.

10 And I was preliminarily at a loss to match this and  
11 pair this with the aiding and abetting section. I'm glad  
12 we've now clarified that this is a separate requested  
13 instruction on Page 27.

14 So can you give me your best sur-sur-reply on why  
15 Defendant has not elicited enough testimony or presented  
16 enough evidence to warrant a separate good faith instruction  
17 in a case that does involve intent to defraud.

18 **MS. BURCH:** Yes, Your Honor. First, the Court  
19 asked me previously about the two cases the Government cited.  
20 I responded to you on *Morrow*.

21 I did not respond to you on *Giraldi*, but it is also  
22 a bank fraud offense. And, in that case, the Fifth Circuit  
23 found that the instruction was sufficiently covered by other  
24 portions of the instruction, such as the good faith  
25 instruction was not -- I mean, I guess in this case it was --

1 it just -- it wasn't an abuse of discretion not to give it, I  
2 think is the way they termed it, but it wasn't given, and it  
3 was okay that it wasn't given.

4 With respect to the evidence, I would point the  
5 Court to the fact that, generally when we see good faith, we  
6 see somebody that, you know, they asked their lawyer, they  
7 tried to make sure that what they did was okay, they took  
8 steps to make sure that whatever the alleged conduct was --  
9 or tried to make steps, to take steps to make sure that  
10 whatever the alleged misconduct was or the alleged crime was  
11 was okay.

12 And, here, I think, if the best argument is that  
13 Shane Smith said "awesome" after the defendant gave an  
14 instruction, we don't get to good faith. We don't -- we had  
15 evidence that the defendant didn't copy any of the lawyers on  
16 his team. He didn't ask any of the people that actually  
17 reviewed the documents, other than Shane Smith. You know, he  
18 didn't ask Shane Smith; he directed Shane Smith.

19 And so also, Your Honor, we would suggest that  
20 typically we see good faith instructions where the defendant  
21 does make some effort to show good faith. Here, what we have  
22 is, oh, well, he -- we can disagree about what the evidence  
23 shows, but, in my view, the evidence was, he didn't know he  
24 couldn't do it, and now some people have come now and said,  
25 yeah, it's okay that you did it anyway, but the evidence

1 was --

2 THE COURT: Ignorance --

3 MS. BURCH: -- what the --

4 THE COURT: -- of the law --

5 MS. BURCH: -- evidence was, which was --

6 THE COURT: Right. I understand --

7 MS. BURCH: -- hide it.

8 THE COURT: I understand the nature of your  
9 argument.

10 Okay. You're standing, Mr. Norris, are we now  
11 going into sur-sur-sur-reply?

12 MR. NORRIS: Yes, Your Honor, if I may?

13 THE COURT: Let's do it.

14 MR. NORRIS: Thank you, Your Honor. So I would  
15 just add one thing, which is that Government's Exhibit 44,  
16 Your Honor, is exactly what Ms. Burch was claiming we were  
17 missing here. Government's Exhibit 44 is an e-mail from  
18 Mr. -- and I believe it is in evidence. It's an e-mail from  
19 Mr. Reagor to John Thompson, who was his -- he was mentioned  
20 in this case. He was an independent advisor.

21 It's an e-mail to Shane Smith, his chief financial  
22 officer. It's also an e-mail to Steve Reinhart, who was a  
23 Government witness in this case, and he was cross-examined  
24 about whether or not he warned the defendant. Steve  
25 Reinhart, although it's unclear whether he acted in a legal



1 capacity, he is a lawyer or was a lawyer at some point.

2 And also on this e-mail is Rachel Reagor, who was  
3 mentioned in this case as well, and she certainly is a lawyer  
4 and did serve as a lawyer at the Reagor-Dykes Auto Group.

5 In this e-mail, Mr. Reagor says -- first, he starts  
6 out about how he appreciates everyone on the deal, but then  
7 he says: I trust all of you to make sure that when we  
8 finalize the agreement that we've not created any situations  
9 we might regret in the future.

10 Then he continues on. I think -- I am sending this  
11 e-mail to all of you because I think it would be very smart  
12 for everyone involved in this transaction and future  
13 transactions to use this e-mail group to communicate any  
14 concerns or feelings about the agreements that we make going  
15 forward.

16 And the rest of the e-mail is a few more paragraphs  
17 to similar effect, Your Honor. And the point being that, if  
18 this is in evidence, and then Mr. Reinhart also testified,  
19 yeah, I didn't -- I didn't stop the IBC deal, didn't warn  
20 him, and, oh, by the way, I took a distribution from the IBC  
21 deal, I think good faith, in addition to the Shane Smith,  
22 CFO, testimony, I think good faith has been fairly raised.

23 **THE COURT:** Is everyone in the courtroom familiar  
24 with the Whac-A-Mole game?

25 **(Laughter.)**

1           **MS. BURCH:** Yes, Your Honor.

2           **THE COURT:** Okay. It's starting to feel like that  
3 with so many attorneys popping up. Okay. So we're now into  
4 the fifth sur of reply.

5           **MR. HAAG:** Okay. Your Honor, that horse is dead  
6 and buried, but, if I may, I did notice as I was going  
7 through -- if we could go back to Page 8, there is one error  
8 in the charge.

9           **THE COURT:** Okay. So let's do this on good faith  
10 instruction, Page 27. The Court has your arguments. This  
11 was briefed very well by both sides.

12           I will have my order on the good faith instruction  
13 and thus the final charge this evening.

14           **MR. HAAG:** Yes, Your Honor.

15           **THE COURT:** And so you will have the benefit of  
16 that, and you can modify your closing arguments to prepare.  
17 I won't ambush either side with a proposed charge that omits  
18 what they think is going to be in the charge. We will do  
19 this tonight. If necessary, my clerks and I will work late.

20           You will have your ruling. You'll know if this  
21 good faith instruction is included, so that you can modify or  
22 prepare closing arguments to match.

23           So the Court is taking under advisement all of the  
24 arguments, all of the cases, all of the reasons stated by  
25 counsel during this Charge Conference on Page 27, the good

1 faith instruction.

2 But back to Page 8.

3 **MR. HAAG:** Yes, Your Honor. I apologize. I  
4 overlooked this earlier, but the instruction on character  
5 evidence was left in, and I think Defense will agree that the  
6 character witnesses were Mr. Lowrance and Mr. Landin, who did  
7 not testify.

8 **THE COURT:** And Defendant, I -- the Court ruled  
9 certain documentary evidence inadmissible that was submitted  
10 by the Defendant as well. I can't remember the exact exhibit  
11 range. It's the Government's argument now --

12 **MR. HAAG:** Yes, Your Honor, it --

13 **THE COURT:** -- that this instruction is not needed?

14 **MR. HAAG:** That's correct, Your Honor. So to admit  
15 character evidence under 608(a), it would be the person knows  
16 the person's reputation or has an opinion on a character  
17 trait at issue, and then the witness would render an opinion  
18 on that either, you know, character or characteristic at,  
19 issue, or the person's reputation for that characteristic at  
20 issue.

21 Here, Landin and Lowrance were the two that were  
22 going to testify to that, and they did not testify, and so we  
23 can remove, I believe, Section 1.10.

24 **THE COURT:** Okay. And, Mr. Norris, who were the  
25 character witnesses in your lineup that testified and offered

1 evidence of general good reputation and truth and veracity,  
2 honesty and integrity, et cetera? This is usually done under  
3 the rule identified by Mr. Haag. I do not recall a witness  
4 that was specific to that.

5 **MR. NORRIS:** Your Honor, I believe, particularly on  
6 the law-abiding citizen portion of the instruction, Chuck  
7 Darter testified regarding the accused's practice of -- or  
8 character for paying his taxes timely and in full. Of  
9 course, Mr. Darter would be keenly aware of that as he was  
10 the defendant's CPA, so he was the defense witness who  
11 testified on that piece, Your Honor.

12 **THE COURT:** Okay. And so for purposes of Page 8  
13 and 1.10, I should look to Chuck Darter as the relevant  
14 witness.

15 **MR. HAAG:** Well, Your Honor, we can dispose of that  
16 pretty quickly, because it has to be a characteristic related  
17 to the offense charged. This is not a tax fraud case or any  
18 sort of tax evasion case or failure to file income taxes.

19 The only reputation characteristics that are at  
20 issue here are truth and veracity, honesty and integrity, and  
21 a law-abiding citizen. And, again, the way that you admit  
22 that evidence is discuss the witness' familiarity with those  
23 traits, how the witness is familiar with those traits, and  
24 then the witness renders either an opinion or states the  
25 reputation in the community. That was not done here.

1           **THE COURT:** The Court sustains the Government's  
2 objection to 1.10. And, with apologies, I did not properly  
3 flag this.

4           I have a witness list here. I do have Mr. Helt and  
5 Mr. Landin listed and I believe Mr. Lowrance as well. They  
6 were noticed and listed as potential character witnesses in  
7 this case, but they were not called, and this testimony was  
8 not elicited.

9           And the Court does find that the Defendant did not  
10 designate or offer character evidence, and so the 1.10  
11 Character Evidence insertion is now omitted, and the Court  
12 will not include that in the final charge.

13           Now, understanding that the Court is taking under  
14 advisement the arguments of counsel on Page 27, which relates  
15 to the good faith instruction, and you'll have my ruling on  
16 that before close of business, let's move to Page 28, 1.26  
17 Duty to Deliberate Verdict Form.

18           This is usually where the attorneys begin to exhale  
19 because everything should be according to form from this  
20 point forward. This 1.26 Duty to Deliberate section does  
21 carry over onto Page 29.

22           Does the Government have any objections to the  
23 proposed language appearing on Pages 28 and 29 on the  
24 proposed jury charge?

25           **MS. BURCH:** No, Your Honor.

1           **THE COURT:** Does the Defendant have any objections  
2 to the language appearing on Pages 28 and 29 of the proposed  
3 jury charge?

4           **MR. NORRIS:** No, Your Honor.

5           **THE COURT:** Okay. Those will be included.

6           We are finally to the last page, Page 30, of the  
7 proposed jury charge. This is the verdict form. Only one  
8 copy of this will be made available to the foreperson of the  
9 jury.

10           Does the Government have any objections to the  
11 verdict of the jury form reflected on Page 30 of the proposed  
12 jury charge?

13           **MS. BURCH:** No, Your Honor.

14           **THE COURT:** Does the Defendant have any objections  
15 to the verdict of the jury form as it appears on Page 30 of  
16 the proposed jury charge?

17           **MR. NORRIS:** No, Your Honor.

18           **THE COURT:** Okay. I think we're at the end.  
19 Counsel are only awaiting instruction on the proposed good  
20 faith instruction -- I'm sorry, awaiting this Court's ruling  
21 on good faith instruction.

22           All of the other disputed language has now been  
23 resolved.

24           As soon as possible, I will issue an order  
25 reflecting the Court's ruling on that instruction and then

1 also attached to that order will be the final jury charge,  
2 and you should anticipate that before close of business.  
3 I'll just admonish you that my close of business time is a  
4 bit later than most, so check your inboxes for that just in  
5 case you need to modify closing arguments in any way to  
6 reflect what will be charged to the jury.

7 So, with that understanding, is there anything  
8 further from the Government?

9 MS. BURCH: No, Your Honor.

10 THE COURT: Is there anything further from the  
11 Defendant?

12 MR. NORRIS: No, Your Honor.

13 THE COURT: You are excused. You can get to work  
14 on closing arguments.

15 We will begin at 8:00, but understanding that there  
16 might be some final housekeeping, I'm amenable to doing some  
17 work before we call the jury in, but same start time, and I  
18 look forward to your closing arguments.

19 If you have any issues with technology, please use  
20 some of that early morning time to resolve any issues with  
21 the ELMO, the television screen. Please orient that so that  
22 you are well prepared for closing.

23 Anything further, Mr. Haag?

24 MR. HAAG: No, Your Honor.

25 THE COURT: Anything further, Mr. Norris?

1                   MR. NORRIS: No, Your Honor.

2                   THE COURT: Okay. Court stands in recess for the  
3 remainder of the day.

4                   COURT SECURITY OFFICER: All rise.

5                   (Proceedings recessed until 8:00 a.m., 10/14/2021.)

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9                   (Further proceedings continued in Trial Volume IV of  
10 IV.)

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18                   I certify that the foregoing is a correct transcript  
19 from the record of proceedings in the above-entitled matter.  
20 I further certify that the transcript fees format comply with  
21 those prescribed by the Court and the Judicial Conference of  
22 the United States.

23

24                   s/Stacy Mayes Morrison  
25                   Stacy Mayes Morrison  
                    Official Court Reporter

11/10/2021  
Date

Stacy Mayes Morrison  
Official Court Reporter